Report on the Insurance Corporation of British Columbia's Minimal/No Damage-Low Velocity Impact Program

Ombudsman
British Columbia

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Table of Contents

Report on the Insurance Corporation of British Columbia's Minimal/No Damage-Low Velocity Impact Program

Executive Summary 1

1. Minimal/No Damage – Low Velocity Impact Program 4

2. Investigation 6

3. ICBC's Response to our Investigation 11

4. Concluding Remarks 13

Appendix 17

ICBC's Response to Ombudsman's Section 23 Report 17

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Executive Summary

In 1992, the Insurance Corporation of British Columbia (ICBC) introduced a program designed to reduce the cost of adjusting claims filed by individuals involved in what were considered by ICBC to be "minor" motor vehicle accidents. The program, initially called the Minimal/No Damage (MND) Program, was renamed the "Low Velocity Impact (LVI) Program" in 1999. References to "the Program" refer to both the MND Program and the LVI Program prior to April 22, 2003, unless we specifically cite the original MND Program.

This Report outlines the outcome of our Ombudsman initiated investigation into allegations of administrative unfairness against ICBC in its administering of the Program.

The Program was premised on ICBC deciding that all low-velocity impact accident claims – identified as those motor vehicle accidents occurring with an impact at 8 kilometers per hour (kmph) or less – were to be denied unless the circumstances of the claim or the accident fell into one of a set of criteria that would remove the claim from the Program. A critical aspect of the Program was that only those low-velocity impact claims removed from the Program would be adjusted on the merits of the claim. This differed from all other claims to ICBC, which are adjusted on their merits. The goal of the Program was to develop a quick and non-confrontational process for separating legitimate claims flowing from low-velocity collisions from those claims that, according to ICBC-established criteria, lacked merit. From the start of the Program up to April 23, 2003, the Program applied to both tort claims for bodily injury and to accident benefit claims.

Since the inception of the Program in 1992, individuals brought complaints about the Program to the Office of the Ombudsman, and by early 1999 my Office became concerned about the number of, and similarity of, those complaints. With a concern that people who had injuries as a result of motor vehicle accidents were possibly being denied fair access to compensation, the Office commenced an Ombudsman initiated investigation in March 1999. We investigated the administrative fairness of a program that restricted some people from having their claims decided on the merits of the individual cases.

During the course of our investigation, ICBC advised us that its goal in introducing the Program was to "not pay a penny more than it should." While the Program may have resulted in less money paid to claimants, the Program did so at the expense of treating claimants arbitrarily when low-velocity impact claims were not considered on the merits of the individual claims.

Our interest throughout this investigation has been to ensure that the system ICBC uses to assess such claims is a fair system. My investigation concluded that ICBC acted in an arbitrary and unfair manner in developing and maintaining a program from 1992 until 2003 that created unfair barriers to recognizing claims stemming from a large number of motor vehicle accidents. After determining that the Program, as it existed from its inception in 1992 until it was modified in 2003, was inadequate and contravened our Office's standards of fairness, I recommended:

> ***"That ICBC review any claim that was closed under the MND/LVI Program if people approach ICBC maintaining that their claims were unfairly denied under that Program."***

Unfortunately, ICBC refused to accept my finding that the previous Program was arbitrary and would not implement my recommendation. The then ICBC President and CEO, Mr. Nick Geer, provided, in part, the following explanation for ICBC's disagreement with our investigative findings:

> *In my view, the LVI Program is a reasonable tool, developed on the advice of experts, for use by ICBC staff to determine when a low speed claim ought to be further assessed. As I have mentioned before, while there may have been inconsistencies or delays in the handling of some individual files, I believe that overall the program has been reasonably administered and that staff has always made reasonable efforts to minimize inconsistencies and delays and to address problems as they arose.*

While ICBC was not prepared to implement my recommendation to ensure that all pre April 2003 claimants were treated in a fair manner, during the course of our investigation ICBC did agree to review and revise many decisions on individual claim files. ICBC's review of the claims referred by our Office resulted in ICBC paying over $1.2 million in claims that would otherwise have been denied under the Program.

On April 22, 2003, ICBC established new criteria for the Program, moving from criteria that were difficult to implement in a fair and consistent manner to criteria that allowed for the examination of the plausibility of actual injuries sustained in accident claims. While the new criteria did not benefit those claimants who may have been unfairly included earlier in the Program, the changes appear to have addressed the fairness concerns identified by our Office relating to the Program from 1992 to April 2003. My decision to

conclude my Ombudsman initiated investigation reflects the significant changes made in the revised Program. Continuing to investigate individual complaints about the administrative actions, omissions and procedures of ICBC will afford my Office the opportunity to assess whether the changes have sufficiently addressed all the fairness concerns raised by the many complainants who contacted us.

I provided ICBC, pursuant to section 23 of the ***Ombudsman Act***, with a report summarizing our investigation into the complaints we received, seeking ICBC's comment and/or action. This Report contains the essence of our section 23 report. This Report also includes, in its Appendix, the response from the then ICBC President and CEO Mr. Nick Geer to our section 23 report.

In Mr. Geer's response, he assured my Office that ICBC took our concerns about the pre April 2003 Program seriously. While this is encouraging, I cannot conclude that ICBC adequately recognized or acknowledged that the Program, as it existed prior to April 22, 2003, did not meet the basic standards of fairness for a public corporation. The fact that ICBC has modified its Program to respond to my Office's concerns does not absolve ICBC of responsibility for running a Program from 1992 to 2003 that unfairly denied claims.

I am disappointed that ICBC was unwilling to accept my recommendation to review those pre-2003 claims from people who return to ICBC with concerns that their claims were unfairly denied under the Program. The issuing of this Report may result in ICBC receiving requests to review a number of pre-2003 claims. It is my Office's opinion that ICBC should be prepared to respond to such requests for review.

This Report identifies my Office's concerns with the Program and also discusses the changes to the Program. I wish to thank those people who brought complaints about the Program to my Office. I also wish to thank ICBC staff for their continuing cooperation and communication throughout our investigation.

Howard Kushner
Ombudsman
Province of British Columbia

1. Minimal/No Damage – Low Velocity Impact Program

The MND Program was developed in the summer of 1992 following discussions among ICBC staff who had been asked by the then President of ICBC for ideas to reduce costs and improve service. Implementation of the MND Program commenced at ICBC's Claim Centres on August 10, 1992.

The following is our outline of the history of the Program's development, which has been culled from ICBC documents:

> From 1988 to 1992 ICBC encountered a dramatic increase in the frequency of claims for soft tissue injuries, an increase that was deemed to be out of proportion with the increase in the population. By ICBC calculations the increase in general damage payments over the four years from 1988 to 1991 was $144,946,381, or 82 percent. This trend became a major concern to ICBC, and concern was expressed that if the trend continued, increasingly higher premiums would be required.
>
> Between June 18, 1992, and July 28, 1992, ICBC held meetings to consider its approach to the management of soft tissue injury claims. This resulted in a proposal document entitled "Soft Tissue and Minimal No Damage Claim Program."
>
> The proposal document was followed by the start-up of the MND Program on August 10, 1992.
>
> ICBC's stated purpose in instituting the MND Program in 1992 was to improve the assessment of personal injury claims presented by people involved in motor vehicle accidents with little or no discernible impact. ICBC noted that in a great many cases these claims involved low-speed rear-end impacts coupled with claims of soft tissue injury that were based on subjective reports of discomfort, without objective physical signs or other kinds of supporting evidence.

The Program was initiated by ICBC to reduce the number of claims from claimants who were considered by ICBC to be healthy individuals involved in minor motor vehicle accidents. The goal of the Program was to develop a quick and non-confrontational

process for separating what ICBC considered to be legitimate claims, flowing from low-velocity collisions, from those claims believed by ICBC to lack merit. Low-velocity collisions were identified as those motor vehicle accidents occurring at an impact speed of 8 kilometers per hour (kmph) or less.

A motor vehicle accident occurring at an impact of 8 kmph or less would result in the accident meeting Criteria 1 and, at least initially, falling within the Program. An assessment was then made to determine whether any of the other established Program Criteria applied, which, if so, would result in the claim being removed from the Program.

The following is the Program Criteria originally developed by ICBC:

Criteria 1. ***Is the transfer of forces to the occupant 8 kmph or less?***

Criteria 2. ***Is the vehicle damage beyond accepted criteria?***

Criteria 3. ***Do relevant pre-existing health problems, injuries or conditions exist?***

Criteria 4. ***Does lifestyle or employment increase susceptibility to injury?***

Criteria 5. ***Is there an objective injury that warrants compensation?***

Criteria 6. ***Are there any other extenuating circumstances?***

Unless a claimant was excluded from the Program in accordance with one of the Program Criteria listed above, ICBC would deny the claim under the Program. MND Committees in each Claim Centre used the "MND Program Flow Chart" to determine whether the Criteria applied to the claim in question. The MND Committees met weekly or bi-weekly to review claims submitted by ICBC adjusters, and unless the MND/LVI Committee made a decision to remove the claim from the Program, the claim would be denied. A denial under the Program meant that the claim would **not** be adjusted on its merits and that ICBC would **not** compensate for any injuries sustained in the accident. Claims that were denied under the Program were not given further consideration unless a claimant submitted additional evidence that called ICBC's decision into question.

An ICBC manager provided the following description of the process that was followed when the Program was implemented in August 1992:

> *If the vehicle damage criteria has been met, the file must then be referred to the minimal/no damage committee for determination, giving consideration to the remaining criteria. If the answer is no to the remaining criteria, then the claim is denied. If the answer is yes to any of the remaining criteria, then the committee will recommend accepting the claim, giving consideration to the extent of payment to be made to the claimant.*

2. Investigation

Some time after ICBC began the Program our Office started to receive complaints from individuals about the fairness of decisions made by ICBC under the Program. By early 1999 the Program had raised serious concerns in our Office, and after receiving a briefing from ICBC about the Program, we commenced a review of files handled by the Ombudsman Referral and Customer Relations Units of ICBC over the previous six-month period. On the basis of our review of those claims files, and on the basis of complaints that had come to our Office, the Ombudsman decided to open an Ombudsman initiated investigation into concerns raised about the Program. We served notice to ICBC in March 1999. We noted that we were investigating the fairness of the process used to determine whether injury claims flowing from motor vehicle accidents that occurred at impact speeds of 8 kmph or less would be included in the Program and thereby summarily dismissed, or whether such claims would be decided on their individual merits.

Our investigation included:

1) a review of a six-month period of related complaints received by ICBC's Customer Relations Unit and the then Ombudsman Referral Unit of ICBC;

2) a review of 62 complaints received by our Office about claims denied under the Program;

3) an audit of over 100 claims files that were considered by the MND Committees at four Claim Centres;

4) interviews of claimants, ICBC staff and other professionals with knowledge of this subject matter; and

5) a review of documentation, research and material associated with the Program.

From the outset of our investigation, our concern was that people who had injuries as a result of low-velocity motor vehicle accidents were being denied an opportunity for a fair, merit-based evaluation of their claim and denied access to benefits that would normally be available to claimants. ICBC developed a set of Program Criteria to assist Claim Centres in determining whether a claim fell within the Program. It appeared to us that the Program Criteria were inconsistently applied and that claims were therefore arbitrarily decided on. This led to some people with seemingly legitimate claims being denied compensation and benefits.

Concerns Identified Through a Review of Complaints

People who came to our Office complained, for the most part, about a Program that was based on the premise that it is unlikely that a person would be injured in a car accident that occurred at an impact velocity of less than 8 kmph. If the impact velocity of a motor vehicle accident was determined to have occurred at 8 kmph or less, claims resulting from that motor vehicle accident fell under the Program unless the claimant could demonstrate that they met one of the Criteria for exclusion from the Program. If none of the Program Criteria applied, the claim was denied without giving further consideration to the merits of the individual claims.

When complainants came to our Office with complaints about the alleged arbitrary nature of decisions relating to their accident, we became concerned about how the Program Criteria were being applied to individual cases. We were especially concerned that seemingly legitimate claims were denied under Program Criteria that did not appear to be applied consistently to all claimants.

Outlined below are examples of claims initially denied by ICBC under the Program and subsequently removed from that Program after our Office notified ICBC that we had received these complaints.

- *Prior to her automobile accident, a 67 year old woman had undergone eight hip operations leading to a total hip replacement, she wore a prosthesis on her left leg,*

had used a wheelchair for some time and had finally recovered to the extent that she could walk with two canes. Following her automobile accident, she now drives a motorized scooter due to her mobility problems. Repeated ICBC reviews of her situation led to the same conclusion: that this woman was ***not*** *unusually susceptible to injury in a low impact collision. After our Office became involved, and 18 months after the woman made her initial claim, ICBC removed this woman's claim from the Program and paid over $18,000 to settle her claim.*

- *Prior to his motor vehicle accident, a 74-year-old man had a lengthy medical history of ailments and injuries dating back to 1976. He had undergone a total left hip replacement, had problems related to a prosthetic right knee, had documented degenerative osteoarthritis, many years of documented back pain, had been involved in a previous accident, and had undergone major surgery six months before the motor vehicle accident in question. However, ICBC concluded that he was* ***not*** *unusually susceptible to injury in a low impact collision. After over eight months and the involvement of our Office, his claim was removed from the Program.*

- *A woman suffered a contusion to her right leg and muscle spasms as a result of a motor vehicle accident. Both contusions and muscle spasms were listed under Criteria 5 as examples of an objective injury that called for the removal of a claim from the Program. Repeated reviews by ICBC rejected this objective evidence of injury as grounds for removing this claim from the Program. ICBC paid this woman $11,573 to settle her claims when it finally removed her claim from the Program and adjusted it on its merits.*

- *A man was driving the front vehicle in a four-vehicle rear-ender. ICBC noted that the impact was severe enough that the back of the driver's seat broke in the collision. There was damage to two of the four vehicles involved in this accident (both estimated at $5000). One of the people involved in this accident had to be taken away on a stretcher in an ambulance. After repeated requests by our Office to remove this claim from the Program, ICBC retained an engineer, who confirmed that the impact velocity for this accident was between 10 and 17 kmph, in excess of the 8 kmph threshold of the Program. ICBC eventually paid over $37,000 to settle this claim.*

- *A woman reported pain to various parts of her body following a motor vehicle accident. Little more than two months earlier, she had suffered a back injury lifting a patient in her workplace. The pain from the back injury was severe enough that her*

doctor recommended she not return to work for 14 to 20 days. At that time, her doctor noted spasm and pain in her back. Despite such evidence, ICBC steadfastly maintained that its denial of this woman's claim was correct. ICBC eventually agreed, over two years after the accident, to remove this claim from the Program.

- *A female motorcyclist was injured in a collision, and her claim was denied by ICBC under the Program. We advised ICBC that this denial appeared unusual in that the Program relied heavily on examinations of bumper damage to confirm impact velocity in a collision. Almost a year after this woman's collision, ICBC removed her claim from the Program, agreeing that the Program was never intended to apply to motorcycle accidents. This woman's claim was eventually settled for over $10,000.*

At various times during our investigation, ICBC called into question the ability of health care professionals, including doctors and physiotherapists, to recognize muscle spasms, one of the objective signs of injury that was supposed to remove a claim from the Program. Our review of claims files included situations where ICBC officials rejected cuts, muscle spasms, bruising, and a broken molar as objective evidence of an injury.

Not all of our efforts to convince ICBC that some claims should be removed from the Program were successful.

- *A woman who suffered muscle spasms and whose muscle spasms were witnessed by her physician had her claim denied by ICBC. Even after the physician confirmed in writing that she had made a clinical observation of these muscle spasms, ICBC refused to change its decision to deny the claim under the Program.*

From the outset of our investigation, we communicated with ICBC in an attempt to remove claims from the Program where they appeared to have been misplaced according to ICBC's own Program Criteria. Many of these claims involved individuals whose age or extensive medical problems or conditions should have excluded them from the Program. ICBC would often obtain new engineering reports, medical assessments or clinical records to justify removal of a claim from the Program. As ICBC did not publicize the Criteria that would lead to the removal of a claim from the Program, claimants were left to present information to ICBC without knowing what would and what would not constitute grounds for adjustment of their claims on their merits.

Our review of several claims led us to become concerned about the apparent lack of interpretive material available to adjusters, which resulted in Claim Centre staff not being

properly informed about the application of the Program Criteria to individual claims. In our opinion, this led to people with similar claims being treated differently.

We reviewed claims files where ICBC's LVI Program Committees had denied claims for people with lengthy histories of a wide range of pre-existing conditions, including individuals with multiple sclerosis and cerebral palsy. At least two people had claims denied for accidents that occurred when they were either returning from or going to the doctor for appointments stemming from previous accidents. This was in spite of Program Criteria stating that "relevant pre-existing health problems, injuries or conditions" would remove claims from the Program.

During the course of our investigation, we reviewed ICBC decisions to deny 94 individual claims under the Program. On each of these claims, we questioned ICBC's application of its own Program Criteria. ICBC agreed that 69 claims should not have been denied under the Program. These 69 claims were subsequently adjusted on their merits. Additional information provided to us by ICBC enabled us to close the other 25 files. During the latter stages of our investigation we continued to receive complaints about the Program. ICBC routinely reviewed its denial of an individual claim under the Program when notified by our Office that we had received a complaint. As a result, another 16 claims were removed from the Program, in addition to the 69 claims mentioned above. In total, ICBC agreed to adjust 85 claims on their merits. Some of these claims were accepted; others were denied on other grounds.

Our investigation of the Program, and our referral of claims back to ICBC for review, led to payments of over $1.2 million to persons whose claims had initially been denied under the Program but were subsequently adjusted on their merits. In no case did we suggest that more should be paid; we did say that the process should be a fair process that evaluated individual injuries on their individual merits.

It was never our intention to require ICBC to spend more than it would if claims were adjusted fairly and on their merits. We acknowledge ICBC's duty to its policyholders to defend itself against questionable claims. We also accept ICBC's assertion that an individual submitting a claim bears responsibility for proving that he or she should be compensated for injuries sustained in an accident. The over $1.2 million in payments that ICBC has made on claims included in our investigation were only necessary because ICBC officials believed that such payments were warranted once they adjusted these claims on their merits.

3. ICBC's Response to our Investigation

During the course of our investigation, our Office communicated our concerns about the Program to ICBC. On December 8, 1999, we provided extensive feedback to ICBC. While some improvements resulted from these communications, broader issues of concern remained.

In 2000, ICBC conducted an internal audit of claims files closed under the Program. The results of this audit were compiled in their May 29, 2000 report entitled "Low Velocity Impact Compliance Review Report" (the 2000 Report). In addition to the concerns raised during our investigation, ICBC's internal audit corroborated problems of inconsistency in the application of the Program, identifying problems with the way ICBC had handled over 38 percent of the 494 bodily injury claims examined.

Shortly after the 2000 Report was issued, the Corporation convened an LVI Guideline Revisit Committee to review the Program. The recommendations of the LVI Revisit Committee were presented to ICBC management for consideration. Our investigation continued, hopeful that what would emerge would lead to measures that would address the concerns we had identified with the Program. ICBC revised the Program and commenced training Claim Centre staff about the new LVI Program Guidelines in December 2000.

Until the Program Criteria document was revised in 2000, individuals had to be able to demonstrate that they were being actively treated by a health care professional in order to convince ICBC that they had a pre-existing condition or injury that made them more susceptible to an injury in a low velocity impact collision. This interpretation did not always take into account pre-existing conditions or previous major surgeries – for example, neck surgeries, spinal operations, and hip and knee replacements.

A concern that we had communicated to ICBC about the initial Program was that accident benefit claims were denied for those claimants who fell under the Program. This meant that claimants disputing their placement in the Program and waiting for a decision from ICBC were not able to receive compensation for benefits such as chiropractic treatments, physiotherapy and massage therapy. Many of the complainants who came to our Office stated that they would have been satisfied if ICBC had provided them with accident benefits to assist in expediting their recoveries. If claimants were not able to pay for these treatments themselves, their recovery was affected by the delayed treatment,

delays of sometimes months after an injury occurred. In its revision of the Program in 2000, ICBC at least began the process of remedying this when it allowed for interim payments for accident benefits until a claimant could meet with an adjuster.

Our Office's concerns about the overall Program remained after the changes to the Program Criteria in 2000. In 2001, my Office completed its investigation and made tentative findings of unfairness. Tentative findings are communicated to an authority when it appears to the Ombudsman that there may be sufficient grounds for making a report or recommendation under the ***Ombudsman Act*** that may adversely affect that authority. We communicated our tentative findings to ICBC in January 2001 and continued to communicate with ICBC about our outstanding concerns. ICBC provided several responses to my tentative findings, and I met a number of times with senior officials of ICBC in attempts to resolve my concerns about the Program.

In January 2002, ICBC advised us that it was intending to consult with orthopaedic specialists and general practitioners to seek input and feedback on the Program Criteria and on the application of the Program Criteria to the Program file-handling procedures. While this was positive news, I remained concerned about the length of time that had passed since my Office first raised its concerns. By September 2002, I had advised ICBC's President, Mr. Nick Geer, of my tentative finding that the Program contravened our Office's basic standards of fairness and my tentative recommendation that the Program be discontinued.

On January 20, 2003, my staff and I met with ICBC President Nick Geer and two of his senior staff. At that meeting, there was considerable discussion about the conceptual principles behind ICBC's adjustment of accident claims. The President advised that ICBC's commitment to its customers and the province should be "to pay not a penny more nor a penny less than is warranted by each accident claim." The President asserted that this should be the goal of any system of claims adjustment by ICBC.

At our January 2003 meeting, ICBC provided its response to our tentative findings, along with supplementary documentation. In its response, ICBC outlined changes that it was initiating with respect to the development of a medical model for ICBC's delivery of medical and rehabilitation services. ICBC noted that the model would apply to all accident benefit claims and that, as a result, important changes would be made to the Program guidelines. The impact of this change was described, in part, as follows in ICBC's response:

> *The 8km/hour standard will be retained for tort claims but not for the handling of accident benefits. These revised file-handling guidelines will be brought into effect once the medical model for accident benefits is in place…*

ICBC advised us on April 17, 2003, that Claims staff had been provided with revised file-handling guidelines for the Program (the 2003 LVI Guidelines), which took effect on April 22, 2003. In these 2003 LVI Guidelines, ICBC removed the handling of accident benefits from the Program in accordance with one of the earlier tentative findings that I had made. In effect, until ICBC modified the Program in response to our investigation, the payment of accident (or rehabilitation) benefit claims under Part 7 of the ***Insurance (Motor Vehicle) Act*** was linked with the broader issue of exposure to tort claims under Part 6 of that ***Act***. ICBC's agreement to remove accident benefit claims from the Program was a significant development that we believed would lead to a fairer and more compassionate approach to claimants. This move resolved one of the critical problems identified throughout our investigation. The Program is now limited to consideration of tort claims.

Further, the Program Criteria used to determine whether a claim was to be considered on its merits was substantially changed. The test used now is:

1. Does the crash involve a velocity change of eight kilometers of less?
2. Is the alleged injury plausible given the available information?

This brings the LVI Program claims more in line with other accident claims that are adjusted on their merits and appears to more closely approximate a review on the merits of the claim.

4. Concluding Remarks

ICBC maintained throughout our investigation that the Program, where appropriate, led to consideration of the merits of each claim by an LVI Committee. Given that our investigation concluded that there were arbitrary features under the Program, I was not able to accept this assertion. Our investigation led us to conclude that some claims were unfairly denied by ICBC under the Program and that ICBC should bring its adjustment procedures for the Program closer to the adjustment procedures used for other motor vehicle accident claims. The April 2003 changes to the Program appear to achieve this, which has resulted in my decision to close my Ombudsman initiated investigation. I

regret, however, that ICBC refused to accept my finding that the Program, prior to the April 2003 changes, contained arbitrary procedures that resulted in the unfair denial of some claims. The then President of ICBC provided the following explanation in his letter of July 21, 2003, for ICBC's disagreement with our investigative findings:

> *In my view, the LVI Program is a reasonable tool, developed on the advice of experts, for use by ICBC staff to determine when a low speed claim ought to be further assessed. As I have mentioned before, while there may have been inconsistencies or delays in the handling of some individual files, I believe that overall the program has been reasonably administered and that staff has always made reasonable efforts to minimize inconsistencies and delays and to address problems as they arose.*

Despite our acceptance that the measures taken by ICBC have addressed our ongoing concerns about the Program, ICBC's response regarding the earlier Program remains inadequate. In accordance with section 23 of the ***Ombudsman Act***, I notified ICBC that our investigation concluded that ICBC acted in an arbitrary and unfair manner in creating and maintaining a Program from 1992 until 2003 that erected unfair barriers to recognizing claims stemming from a large number of motor vehicle accidents. Our investigation concluded that the Program, as it existed from its inception in 1992 until it was modified in 2003, was inadequate and contravened our Office's standards of fairness for an administrative program. I have made the following recommendation, which stems from this finding, pursuant to section 23 of the ***Ombudsman Act***:

> **That ICBC review any claim that was closed under the MND/LVI Program if people approach ICBC maintaining that their claims were unfairly denied under that Program.**

ICBC's final response to our investigation, provided in a letter dated April 29, 2004, is included in the Appendix.

Although my Office regrets that ICBC has declined to accept the above recommendation, I note that a positive outcome of our Ombudsman initiated investigation has been the many claims that were reviewed by ICBC and adjusted on their merits. These reviews resulted in decisions being overturned for legitimate claims, with claimants being compensated for injuries sustained in motor vehicle accidents. A further positive outcome is the new amended Program Criteria, which means both that the Program no longer

includes accident benefit claims in its low-velocity impact restrictions and that the current test of plausibility of injury more closely approximates a review on the merits of the claim.

Appendix

ICBC's Response to Ombudsman's Section 23 Report

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April 29, 2004

VIA COURIER

Mr. Howard Kushner, Ombudsman
200-1111 Melville Street
Vancouver, BC
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Dear Mr. Kushner:

Thank you for your letter of March 22, 2004, enclosing your report on your investigation into ICBC's Low Velocity Impact Guidelines ("guidelines").

We read your report with interest and are encouraged by the fact that you feel our current process meets your office's standards of fairness. We also take your concerns about the process followed prior to April 2003 seriously and appreciate the opportunity to respond. There are a number of important points about ICBC's guidelines that need to be highlighted.

ICBC has a responsibility to be fair to our 2.7 million policyholders.
Claims for whiplash injuries are, by definition, subjective and are notoriously hard to prove or disprove. It is an unfortunate reality that some individuals present claims when involved in minor accidents where no injury actually occurred, where the injury was so minor as to not warrant compensation or where it is unclear that the injury was related to the accident. ICBC has a responsibility to recognize that reality and to identify an approach to claims in this category. Moreover, ICBC has a duty to defend those policyholders against whom these injury claims are made. Our guidelines enable ICBC to serve the interests of all of our customers.

The guidelines are helping to keep insurance rates low and stable in British Columbia.
In the early 1990's, ICBC, like many motor vehicle insurers across North America, faced significant increases in the number of injury claims being presented by the public. Surprisingly, this was occurring even though vehicle design was improving and crash rates were decreasing. ICBC's response was to develop guidelines for handling claims arising from low velocity impacts. The guidelines have assisted ICBC and our policyholders in avoiding the auto insurance crises experienced in most other provinces.

ICBC wants to ensure that our customers are protected and receive fair and affordable insurance services.
Failing to scrutinize low impact whiplash claims properly would not be fair to the premium-paying public.

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To enable ICBC to scrutinize these claims properly, guidelines were designed by ICBC staff, experienced in dealing with injury claims, and in consultation with professionals knowledgeable in the field. ICBC concluded that it was reasonable to assume that, absent unusual factors, it was unlikely that someone would be injured in an accident where the impact forces to the individual were slight. For ICBC, the issue was the sufficiency of evidence that an injury had been sustained. Consequently, it was decided that claims arising from these circumstances should be subjected to greater scrutiny than they had received in the past.

The purpose of the guidelines was to provide direction to the claims staff as to how to treat these types of claims. The impact forces sustained by occupants in these crashes are similar to being jostled while going over a speed bump. In the main, such forces would not be expected to result in an injury.

Our application of the guidelines was necessarily firm, but recognized that some people do sustain compensable injuries in low impact collisions. If the vehicle damage indicated a low velocity impact, the claim was reviewed by a committee to determine whether there were factors that would suggest a compensable injury might have occurred.

Notwithstanding your criticisms, we still pay one-third of all the minor whiplash claims that are below the speed threshold.
Your report is critical of this committee process and of the criteria that were used by our claims staff to assess these claims prior to April 2003. We believe the process was a reasonable and balanced way to adjust low impact claims, recognizing both the circumstances of the particular claims, and the important factor which they have in common: the lack of a substantial physical impact to the vehicle and its occupants.

You have acknowledged that the individual submitting a claim bears the responsibility of proving that she or he should be compensated for any injuries sustained in the accident. The focus of our process was to reinforce that this is where the onus lies. In the absence of objective medical evidence, there is often only the claimant's assertion that he or she was injured. The guidelines developed over the years were intended as an aid to claims staff to determine the plausibility of injury in a way that was reasonably consistent.

Upon request, any claim denied under the guidelines was subject to review and to further consideration for new evidence.
ICBC considers the individual circumstances of each claim to determine whether there is sufficient evidence to warrant payment. The adjustment of claims is always a matter of judgment and there often is room for disagreement.

The guidelines, as a whole, have been reviewed and refined over time. When new medical information was presented or there were further developments over the passage of time, many claims that were initially denied were reconsidered and some were accepted. There has always been recourse for individual claimants who disagree with the decision of the committee. Whenever a claim was denied, the claimant had an opportunity to have the claim reviewed by the manager. Ultimately, the remedy for people unhappy with the final decision was to take legal action.

The research in BC is probably the most sophisticated in North America. Vancouver-based research is being used by U.S. engineers to offer opinions in American courts. Contrary to the views expressed in your report, we believe that the engineering research supports the contention that it is unlikely that people would be hurt in a low speed crash.

In research recently commissioned by ICBC, the injury thresholds used were not based on volunteer subject tests, but rather, were the results of real-life collisions from a Swedish study. Again, the findings supported the contention that injuries were unlikely to occur, even at impact forces greater than eight kilometres per hour.

Your report refers to a number of specific cases, and it would be inappropriate to respond individually. We do state that we disagree with your characterization of these cases.

In conclusion, we believe that ICBC has acted reasonably and responsibly in its management of injury claims arising from low velocity impact collisions, meeting the interests of those people who have claims as well as those who pay premiums.

Sincerely,

Nick Geer
President and CEO

cc: Honourable Rich Coleman, Solicitor General
T. Richard Turner, Chair, ICBC

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